

For Training Purposes Only

Ohio Department of Higher Education Advanced Decision-Maker Training Modeling and Practice Script for Training Only February 25, 2021 and March 18, 2021

This script is for training purposes only and is not based upon an actual matter or individuals. Because this script was designed for training only, it is incomplete. Scripts should be tailored to each institution and to each matter.

Part I – This is an example of the introduction of a script for the live cross-examination hearing for you to have and take back to your institutions based upon the scenario provided to you this morning. We will present it to you and then go over it as a group.

Decision Maker: Good morning and thank you for joining me today for the live cross-examination hearing in case No. 2020-0001. My name is ____ and I will be serving as the decision-maker in this matter. As we prepare to begin the hearing today, I want to point out that I am reading from a script to ensure transparency and consistency between hearings. The hearing process is unique to the University and is designed to provide a live cross-examination hearing to resolve the Title IX claims in this matter. The process is not the same process used in civil or criminal courts.

The matter today involves two claims by Complainant Cassie Coulter alleging violations of the Title IX Sexual Harassment Policy by Respondent Roger Reynolds. Specifically, Cassie alleges that Roger sexually assaulted Cassie in violation of Corona College's Title IX Policy in two ways: (1) by touching her breasts without consent, and (2) by engaging in sexual intercourse with her without consent.

Cassie is here today with her advisor, Felicia Faulkner. I'll note for the record that Felicia is also a witness in this matter who will be testifying today, as well.

Roger is here today with his advisor, attorney Alan Anders.

Both parties identified the following witnesses:

- Sam Sawyer, who is scheduled to log in this afternoon
- Todd Taylor, who did not respond to requests to attend today
- Gus Greeley, who did not respond to requests to attend today
- Bob Bartender, who did not respond to requests to attend today
- Xavier Xerxes, who did not respond to requests to attend today

This is a hearing script based on a completely fictionalized investigation report that has been prepared for use in a Title IX training for decision-makers. Any resemblance to any individual, situation, or case is purely coincidental. This script is not detailed to the recommended level because it is not tailored to a specific Title IX policy. This script does not include every topic that can or should be included in a hearing script, and it is not intended to be used a hearing script in its current form. Please consult with institutional legal counsel about how to modify parts of this hearing script to be consistent with your institution's Title IX policy.

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Additionally, the following witnesses were identified by Cassie to attend today:

- Roger Reynolds, Respondent
- Felicia Faulkner

Additionally, the following witnesses were identified by Roger to attend today:

- Cassie Coulter, Complainant

In compliance with the Title IX Regulations, I may not consider when I write my decision any prior statements by parties or witnesses that are not subjected to cross-examination in this hearing.

We will proceed today with questioning in the following order:

- Questioning of Cassie by Roger's advisor. I will then allow Cassie's advisor to ask follow up questions of Cassie. I may ask questions of Cassie.
- Questioning of Roger by Cassie's advisor. I will then allow Roger's advisor to ask follow-up questions of Roger. I may ask questions of Roger.
- Questioning of the witness:
 - Sam Sawyer by Cassie's advisor. I will then allow Roger's advisor to ask questions of Sam. I may ask questions of Sam.

I will now read the rights and responsibilities for the parties and their advisors and discuss my expectations for this hearing today. At the end of my explanation of the rights and responsibilities of this process, I will ask each party and advisor to confirm that they understand the rights and responsibilities. I will repeat this process for each witness before the witness answers questions.

[Discussion about options to include reminders for pauses after questions for decision-maker to issue a relevancy determination and on decorum]

[Also consider providing opportunities for questions]

Part II -live presentation by our staff to provide you with examples of questioning and decision-maker determinations on issues of relevance pursuant to the Title IX Regulations: relevancy, Rape Shield and exceptions, treatment records, and privilege.

A. Relevancy General

Decision Maker: Attorney Anders, you may begin your questioning of Cassie.

Roger's Advisor: Cassie, you are enrolled at the University, correct?

Decision Maker: Relevant, you may answer.

Cassie: Yes.

Roger's Advisor: You met Roger on September 19, 2020, correct?

Decision Maker: Relevant, you may answer.

Roger's Advisor: You remember meeting him at a party?

Decision Maker: Relevant, you may answer.

Cassie: Yes.

Roger's Advisor: Do you remember kissing him?

Decision Maker: Relevant, you may answer.

Cassie: Yes.

Roger's Advisor: Do you remember putting your hands down Roger's pants?

Decision Maker: Relevant, you may answer.

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B. Presentation of questioning of Complainant (Cassie) with focus on the Rape Shield protection and its exceptions for complainant’s sexual behavior or predisposition

Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, UNLESS

- Such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
- If the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.

[34 C.F.R. 106.45(b)(6)(i)]

Cassie: Yes.

Roger’s Advisor: You met Roger on September 19, 2020, correct?

Decision Maker: Relevant, you may answer.

Cassie: Yes.

Roger’s Advisor: You met him at a party, correct?

Decision Maker: Relevant, you may answer.

Cassie: While I was really drunk.

Roger’s Advisor: Is that a ‘yes’?

Decision Maker: Relevant, you may answer.

Cassie: Yes.

Roger’s Advisor: You ended up having sex with Roger that night?

Decision Maker: Relevant, you may answer.

Cassie: I was raped, yes.

Roger’s Advisor: Have you had sex with other people you met at parties?

Decision Maker: Under the policy, I must exclude evidence of the Complainant’s “sexual behavior or predisposition” UNLESS (1) its use is to prove that someone other than the Respondent committed the conduct, OR

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(2) it concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent. Can you help me understand if this question fits into one of these two exceptions?

Roger's Advisor: My question, and line of questions, concern a pattern by Cassie of having consensual sex with people she meets at parties.

Decision Maker: Your question does not fall into one of the exceptions I have detailed and your question is not relevant here. Please ask another question.

C. Presentation of questioning of parties on treatment records

According to 34 C.F.R. 106.45(b)(5)(i), cross-examination must exclude **consideration** of a party's records that are made or maintained in connection with the treatment of the party by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting or assisting in the professional's or paraprofessional's capacity UNLESS

- institution of higher education obtains party's voluntary **and** written consent to consider for the grievance process

[...]

Cassie's Advisor: Cassie, did you get a rape kit completed on September 20, 2020?

Decision Maker: Relevant, you may answer.

Cassie: Yes.

Cassie's Advisor: I have the rape kit records right here, can you read it aloud for me?

Decision Maker: According to 34 C.F.R. 106.45(b)(5)(i), cross-examination must exclude **consideration** of a party's records that are made or maintained in connection with the treatment of the party by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting or assisting in the professional's or paraprofessional's capacity UNLESS the institution of higher education obtains party's voluntary **and** written consent to consider for the grievance process.

The rape kit, or Sexual Assault Nurse Exam (SANE) is a treatment record of Cassie's. I do not see anything in the record reflecting the voluntary and written consent to include these records in this process.

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Cassie's Advisor: Cassie, you are fine with me using this, right?

Decision Maker: I am still required to have written consent. Cassie, I see your SANE report in the record, but I don't see your written waiver to include it. Can someone point me to that document?

D. Presentation of questioning of parties on attorney-client privilege, and conversations with counselors and medical professionals.

According to 34 C.F.R. § 106.45(b)(1)(x), a recipient's grievance process cannot require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of information protected under a legally recognized privilege, UNLESS the person holding such privilege has waived the privilege.

Cassie's Advisor: Roger, didn't your attorney tell you how to answer these questions today?

Decision Maker: According to 34 C.F.R. § 106.45(b)(1)(x), a recipient's grievance process cannot require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of information protected under a legally recognized privilege, UNLESS the person holding such privilege has waived the privilege. Your question appears to seek attorney-client privileged information. A question seeking what Mr. Anders told Roger or what Roger told Mr. Anders is privileged. This question is not relevant. Please ask another question.

E. Issues of Decorum

Relevant questions must not be abusive and enforcement of decorum must be applied evenhandedly. Where the substance of a question is relevant, but the manner of the question is "harassing, intimidating, or abusive (for example, the advisor yells, screams, or physically 'leans in' to the witness's personal space)" you may evenhandedly enforce the rules of decorum and remind participants to be respectful and non-abusive.

Cassie's Advisor: Roger, you're a rapist aren't you!

Decision Maker: Felicia, I'll remind you of the rules of decorum in this hearing. There is no yelling or harassing permitted. Please ask your question in a respectful and non-abusive manner.

Cassie's Advisor: He doesn't deserve respect because he's a scumball!

Decision Maker: Felicia, I will again remind you of the expectation of decorum in this hearing and I will remove you from this hearing if you do not comply.

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At this point, the University would provide another advisor for Cassie. Let's take a 10-minute break.

Part III - We will now break out into smaller groups for practice in breakout rooms. Please accept the notification you receive on your screen to join your breakout/meeting room for practice making relevance determinations for the Rape Shield protection and its exceptions, use of treatment records at a hearing, and questions seeking attorney-client privileged information.

Our staff will play the roles of advisors, and volunteers (hopefully you!) will practice making relevancy determinations as modeled by our staff above.

Questioning of Cassie by Roger's Advisor

Practice Question 1:

Roger's Advisor: Cassie, have you ever had sex with Roger's roommate Sam?

Decision Maker: *[For group]*

[discuss as group possible next conversation/questioning with Roger's Advisor, Decision Maker, and Cassie]

Practice Question 2:

Cassie's Advisor: Cassie, were you confused about who was having sex with you the night of September 19, 2020?

Decision Maker: *[For group]*

[discuss as group possible next conversation/questioning with Cassie's Advisor, Decision Maker, and Cassie]

Practice Question 3:

Roger's Advisor: Cassie, have you had sex with anyone since you were allegedly sexually assaulted by Roger?

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Decision Maker: *[For group]*

[discuss as group possible next conversation/questioning with Roger's Advisor, Decision Maker, and Cassie]

Practice Question 4:

Roger's Advisor: Why isn't there a copy of the rape kit in the record?

Decision Maker: *[For group]*

[discuss as group possible next conversation/questioning with Roger's Advisor, Decision Maker, and Cassie]

Practice Question 5:

Roger's Advisor: Cassie, did you tell your friend Felicia that you liked having sex with Roger?

Decision Maker: *[For group]*

[discuss as group possible next conversation/questioning with Roger's Advisor, Decision Maker, and Cassie]

Practice Question 6:

Roger's Advisor: Cassie, you're a liar, aren't you?!

Decision Maker: *[For group]*

[discuss as group possible next conversation/questioning with Roger's Advisor, Decision Maker, and Cassie]

Practice Question 7:

Roger's Advisor: Cassie, were you upset Roger didn't want to date you?

Decision Maker: *[For group]*

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[discuss as group possible next conversation/questioning with Roger's Advisor, Decision Maker, and Cassie]

Questioning of Roger by Cassie's Advisor

Practice Question 8:

Cassie's Advisor: Roger, you don't ever ask for verbal consent before you have sex with women, do you?

Decision Maker: *[For group]*

[discuss as group possible next conversation/questioning with Cassie's Advisor, Decision Maker, and Roger]

Practice Question 9:

Cassie's Advisor: Roger, you didn't get verbal consent for sex from Cassie, did you?

Decision Maker: *[For group]*

[discuss as group possible next conversation/questioning with Cassie's Advisor, Decision Maker, and Roger]

Practice Question 10:

Cassie's Advisor: Roger, did you tell your attorney the truth about what you did that night?

Decision Maker: *[For group]*

[discuss as group possible next conversation/questioning with Cassie's Advisor, Decision Maker, and Roger]

Practice Question 11:

Cassie's Advisor: Roger, have you been accused of rape before?

Decision Maker: *[For group]*

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[discuss as group possible next conversation/questioning with Cassie's Advisor, Decision Maker, and Roger]

Practice Question 12:

Cassie's Advisor: Roger, do you have a conscience!?!

Decision Maker: *[For group]*

[discuss as group possible next conversation/questioning with Cassie's Advisor, Decision Maker, and Roger]

Practice Question 13:

Cassie's Advisor: Roger, are you lying today?

Decision Maker: *[For group]*

[discuss as group possible next conversation/questioning with Cassie's Advisor, Decision Maker, and Roger]

Practice Question 14:

Cassie's Advisor: Roger, you weren't surprised by Cassie's Title IX complaint, were you?

Decision Maker: *[For group]*

[discuss as group possible next conversation/questioning with Cassie's Advisor, Decision Maker, and Roger]

When you and your group are done, you may take a break until we return to the main room at 4:00 p.m.

Having technical difficulty? Contact: Alyse Demme at ADemme@bricker.com or call at 614.227.6914